QUESTION PRESENTED

Whether the decision of the Secretary of Commerce not to undertake a statistical adjustment to the 1990 census violated the Constitution when it was foreseen that a severe differential undercount of Blacks and other minorities would occur.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 94-1614
STATE OF WISCONSIN,
PETITIONER
v.
CITY OF NEW YORK, ET AL.

No. 94-1631
STATE OF OKLAHOMA,
PETITIONER
v.
CITY OF NEW YORK, ET AL.

No. 94-1985
UNITED STATES DEPARTMENT OF COMMERCE,
ET AL, PETITIONERS
v.
CITY OF NEW YORK, ET AL.

ON APPEAL FROM UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE CITY OF DETROIT AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The City of Detroit submits this brief in support of the Respondents' position and urges this Court to affirm the decision of the Court of Appeals and remand the case to the district court for further proceedings in light of the Court of Appeals' Opinion.

The City of Detroit seeks to address the well documented and long-standing problem of large numbers of minorities and inner city residents not being counted during the taking of the decennial census. It is the position of the City of Detroit that the manner in which the Census Bureau conducted the 1990 decennial census in the City of Detroit resulted in a serious undercount in that large numbers of persons actually residing in the City of Detroit were not included in the City's or the State's official population count. The Secretary of Commerce's refusal to accept the recommendation of the Director of the Census Bureau that a statistical adjustment was reasonable and necessary was unconstitutional, and as a result, City of Detroit residents' representation and weight of vote in the United States House of Representative and in the Michigan State Legislature were diluted relative to that of other citizens of Michigan and of other states. Due to the racially differential undercount within the State of Michigan, the City of Detroit, which is 76% black and which contains 60% of Michigan's entire black population, was disproportionately undercounted in relation to the majority of other states and all or virtually all of the Michigan's other cities, which are all white or have substantially lower black populations than the City of Detroit. Thus, within the State of Michigan, there was a violation of the constitutional principle of "equal representation for equal numbers of people" in the United States House of Representatives.

The Facts Relating to the Undercounting of the City of Detroit in the 1990 Decennial Census[1]

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[1]The facts relating to the undercounting of the City of Detroit in the 1990 decennial census is set forth fully in the opinion of the Sixth Circuit Court of Appeals, City of Detroit v. Franklin, 4 F.3d 1367, 1369-1372

The official population count of the City of Detroit in the 1990 decennial census was 1,027,974, consisting of 777,916 blacks and 250,058 non-blacks, which gave the City of Detroit a black population of 75.7%. The black population of the State of Michigan was 1,291,706 out of a total population of 9,295,297, giving the State of Michigan a black population of 13.9%. According to the official count, 60% of Michigan's black population reside within the City of Detroit, and the remaining 513,790 black persons reside in significant numbers only in relatively few other cities. In a large majority of Michigan's cities and sub-units, there is little or no black population. City of Detroit demographers have estimated that the population of the City of Detroit as of April 1, 1990, was 1,122,659.

As in past decennial censuses, the 1990 decennial census resulted in a differential racial undercount, with blacks being undercounted disproportionately to whites. According to figures derived from the Post-Enumeration Survey ("PES") that was conducted by the Census Bureau after the census head count, the black undercount rate on the national level was 4.8%, compared to a 1.7% undercount rate for whites. According to the undercount figures for the State of Michigan derived from the PES, Michigan's undercount was 108,706, with an undercount for Detroit of 37,026, or approximately 34% of the total. Thus, with respect to the PES figures, it is not disputed that the City of Detroit, with its large black population, was disproportionately undercounted in relation to all or virtually all other states and all of Michigan's other cities and sub-units, which are all-white or have substantially lower black populations than the City of Detroit. When the official population count of the census was used to reapportion

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(6th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1217 (1994).

Michigan's congressional representation, it followed that the residents of the City of Detroit, which was disproportionately undercounted in relation to all or virtually all of Michigan's other cities and sub-units and other states, received proportionately less congressional representation in the United States House of Representatives and Michigan Legislature than was received by the residents of other states and of the other cities and sub-units in the State of Michigan.[2]

Congress has established numerous programs of grants-in-aid to cities and other sub-units that are based on the population of the cities and sub-units, as contained in the official population count prepared and certified by the Census Bureau in connection with the decennial census and/or the mid-year census authorized under 13 U.S.C. § 141(d)(e). Such programs, under which the City of Detroit

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[2] To illustrate, since Michigan, with an officially reported population count of 9,295,297, is entitled to 16 seats in the House of Representatives, each Congressional district within the State of Michigan should have approximately 580,956 persons. The officially reported population count of the City of Detroit is 1,207,974, so that, as reported, the City of Detroit would embrace 1.769 Congressional districts. If an adjustment for the racially differential undercount had been made in accordance with the figures derived from the Post-Enumeration Survey, Michigan's total population would be approximately 9,404,000, so that each Congressional district would contain approximately 587,750 persons. With an adjusted popuiation count of 1,065,000 according to the Post-Enumeration Survey, instead of an official population count of 1,027,974, the City of Detroit would embrace 1.811 Congressional districts instead of 1.769. Thus, the use of the unadjusted officiai population count to determine Congressional representation within the State of Michigan means that residents of the City of Detroit have proportionately less representation in the House of Representatives than the residents of all or virtually all of the other cities and sub-units in Michigan.

receives substantial amounts of federal funds, include Community Development Block Grants, Rental Housing Rehabilitation, Emergency Shelter Grants, and Urban Mass Transit Capital and Operating Assistance. Because the population of the City of Detroit, as reported by the Census Bureau in the official population count of the 1990 decennial census, was substantially less than the City's actual population, and substantially less than what its population would have been if an adjustment had been made for the racially differential undercount nationwide and/or within the State of Michigan, the City of Detroit received substantially less amounts of federal funds under these programs than it otherwise would have been entitled to receive.

The City of Detroit filed suit in the Eastern District of Michigan on July 25, 1991, with federal jurisdiction premised on 28 U.S.C. § 1331, alleging two counts of constitutional violation. The plaintiffs sought to compel an adjustment or revision of the census for Michigan alone. City of Detroit v. Franklin, 4 F.3d 1367, 1377 (6th Cir. 1993), cert. denied, ___ US ___, 114 S.Ct. 1217 (1994). Count I, the undercount claim, alleged that the manner in which the Census Bureau conducted the 1990 decennial census in the City of Detroit resulted in a serious undercount in that large numbers of persons actually residing in the City of Detroit were not tabulated and so were not included in the City's official population count. The undercount claim related to the way the Census Bureau conducted the census in Detroit. The facts relating to the way in which the census was conducted in Detroit are set out fully in the opinion of the Sixth Circuit Court of Appeals, City of Detroit v. Franklin, supra, at 1369-1372. Count II, the statistical claim, alleged that as a result of the failure to make a statistical adjustment, plaintiff Young's (then Mayor Coleman A. Young) and other residents of the City of

Detroit representation and weight of vote in the United States House of Representatives were diluted relative to that of other citizens of Michigan and other states when the official population count of the cities and sub-units of the State of Michigan, as reported and certified by the Census Bureau, was used in the reapportionment of Michigan's congressional representation following the 1990 decennial census.

The basis of the plaintiffs' statistical adjustment claim was that because of the concentration of Michigan's black population within the City of Detroit and a few other areas in Michigan, a statistical adjustment for the racially differential undercount within the State of Michigan, under any method of adjustment, would produce an official population count for the cities and sub-units of the State of Michigan that, on balance, would be more accurate, or "closer to the truth," than an official population count based on the raw unadjusted data alone. The refusal to make a statistical adjustment was unconstitutional. The "PES" data indicated that the undercount for the City of Detroit was 37,026 out of Michigan's total undercount of 108,708. The failure to adjust the undercount for City of Detroit residents and other minorities who live in urban areas with high black populations, deprived minorities of their right of equal representation in the United States House of Representatives, and in the State Legislature of Michigan, and the lost of substantial sums of funds. Thus, the refusal of the Secretary of Commerce to adjust the census severely affected the City of Detroit on the national and state levels.

The district court granted the defendant Secretary of Commerce motion for summary judgment on both counts of the complaint on the ground that the plaintiffs "failed to state a violation of any judicially enforceable constitutional right." City of Detroit v. Franklin, 800 F.Supp. 539, 540 (E.D.

Mich. 1992). The Sixth Circuit Court of Appeals in City of Detroit v. Franklin, 4 F.3d 1367 (6th Cir. 1993), affirmed the district court's grant of summary judgment. The Sixth Circuit, relying on Tucker v. United States Department of Commerce, 958 F.2d 1411 (7th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 407 (1992), stated that a "claim to a census adjustment invokes no judicially administrable standards." Id. at 1418.

STATEMENT OF THE CASE

Amicus adopts the statement of the case as presented by Respondent City of New York, but wishes to emphasize those facts surrounding the undercounting which are peculiar to the City of Detroit as stated in the Statement of the Amicus Curiae Interest and as stated in the City of Detroit v. Franklin, 4 F.3d 1367, 1369-1372 (6th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1217 (1994).

SUMMARY OF ARGUMENT

The Apportionment Clause, Article I, Section 2, Clause 3 (Art.I, §2, cl.3) requires that the Census Bureau make a tabulation of the population of each state and of each city and sub-unit within a state that as accurately as possible includes all person reasonably capable of being determined to reside within each state and within each city and sub-unit within a state. This constitutional obligation is breached if the census is conducted in a particular locale, such as the City of Detroit, in such a manner that substantial numbers of persons are in fact missed or undercounted, so that the official population count for that place as reported by the Bureau is substantially less than its actual population and results in a serious undercount of minorities. A breach also

occurs if the Secretary of Commerce fails to use proven statistical techniques to adjust the official population count among the states and of the cities and sub-units within a state for the admittedly racially differential undercount, when the Census Bureau has declared that these techniques would increase the accuracy of the census and correct the undercount of minorities. Where an official population count as adjusted would more accurately report the actual population of a state and of the cities and sub-units within the state, than an official population count based on the raw unadjusted census data alone, which predictably results in a differential undercount of members of minority groups, the constitution has been violated.

The constitutional basis for the decennial census relates entirely to the apportionment of representation in the United States House of Representatives among and within the several states and to the representation of persons within that body in accordance with the principle of equal representation for equal numbers of people. In regards to the constitutional objective of "equal representation for equal numbers of people" in the United States House of Representatives, the differential undercounting of minorities is a serious problem, because it is not randomly distributed. The racially differential undercount for blacks in the 1990 Census was about three times that for non-blacks. This means that cities like the City of Detroit, with its 75.6% black population, are disproportionately undercounted in relation to virtually all other states and all of Michigan's other cities which have substantially lower black populations than the City of Detroit. Thus, the State of Michigan, on the national level, and City of Detroit residents received proportionately less congressional representation in the United States House of Representatives than was received by other cities in other states and other cities in the State of Michigan.

Accordingly, within the State of Michigan, and among other states similarly situated, there has in fact been a violation of the constitutional principle of equal representation.

A loss of representation raises a concern of constitutional dimension, and challenges to apportionment are fully justiciable. The constitutional obligation of the Census Bureau to conduct the most accurate census that it is reasonably possible to conduct, relates to and is derived from the constitutional function of the decennial census: "to enumerate the whole number of persons in each State" for the purpose of apportionment of representation in the House of Representatives." First, Art. I, § 2, cl.3, requires that the apportionment of Congressional representation among the several states and within each state take place strictly in accordance with the principle of equal representation for equal numbers of people. Second, the official population count of the several states and of the cities and sub-units within each state, as tabulated and certified by the Census Bureau, is the constitutional basis for the apportionment of Congressional representation among the several states, and is in fact the only constitutionally permissible basis for the apportionment of Congressional representation within each state. This being so, the official population count of all of the several states and of each city and sub-unit within a state must be as accurate as is reasonably possible and must not disproportionately fail to include persons living in a particular state or states in relation to persons living in other states or persons living in a particular city or sub-unit within a state in relation to persons living in other cities or sub-units in the state.

Minority residents of the disproportionately undercounted states or the cities and sub-units within a state will in actuality have less representation in the House of

Representatives than the residents of the other states and the residents of the cities and sub-units within a state for whom the official population count more accurately reports their actual population. Since the right to vote in a free and unimpaired manner is preservative of other basis civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

The principle of equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality or for which justification is shown. The effect of the racial differential undercount, which was left uncorrected, was to create a deviation from an accurate census, far more than is constitutionally tolerable.

Clearly, the differential undercounting of minorities was not unavoidable. The Court of Appeals found to the contrary as the Secretary of Commerce conceded that "PES adjusted estimates reflect more accurately the total population and the ethnic population of the country." The record clearly established in the instant case that no legally acceptable justification for tolerating the differential undercount existed.

Art. I, § 2, cl. 3 of the United States Constitution requires that the official decennial population count reflect as accurately as is reasonably possible, the true population of the state, cities, and other governmental sub-units within each state. The official population count using only raw unadjusted census data, does not accurately reflect the actual population of the states, and governmental units within the states. Raw unadjusted census data dilutes the weight of a

citizen's vote and strikes at the heart of representative government. The failure to adjust the data of the decennial census for a known undercount of minorities violates the Constitution and Article I, § 2, cl. 3, which guarantees that all people will have their vote counted equally with other persons.

Because of the nature of the right, the Court of Appeals correctly applied heightened judicial scrutiny of the Secretary's decision. The Court of Appeals properly disapproved of the district court's extreme deference. Following the Supreme Court's teachings and analysis therein in a line of authority of caselaw that runs from Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), through Karcher v. Daggett, 462 U.S. 725, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983), the Court of Appeals observed that the requirement of a "good-faith effort" to achieve equality, is imposed on federal, as well as state, actors, where allocation of political representation is at issue. Therefore, the Court of Appeals was correct in ruling that the United States government must explain what legitimate governmental objective it relies upon to support its decision to refuse to adjust the census.

ARGUMENT

I. THE SECRETARY'S DECISION NOT TO UNDERTAKE A STATISTICAL ADJUSTMENT OF THE 1990 CENSUS WAS INCONSISTENT WITH THE CONSTITUTION AS THE APPORTIONMENT CLAUSE IMPOSES A JUDICIALLY COGNIZABLE OBLIGATION ON THE CENSUS BUREAU TO SUBMIT AN OFFICIAL

POPULATION COUNT FOR EACH STATE AMONG THE STATES AND FOR THE CITIES AND SUB-UNITS WITHIN EACH STATE THAT AS ACCURATELY AS POSSIBLE INCLUDES ALL PERSONS REASONABLY CAPABLE OF BEING DETERMINED TO RESIDE WITHIN EACH STATE AND WITHIN EACH CITY AND SUB-UNIT OF A STATE.

The heart of this case involves the constitutional guarantee of equal representation - an equal number of votes for an equal number of people. The issue is whether Plaintiffs-Respondents' constitutional rights were violated by the Secretary of Commerce refusal to adjust the census when it was undisputed that the Post Enumeration Survey (PES) resulted in a more accurate count than the original census and would have substantially lessened the minority differential undercount. City of New York v. Department of Commerce, 34 F.3d 1114, 1122-23 (2nd Cir. 1994). The Secretary's refusal to use the more accurate data was inconsistent with the constitutional goal of equal representation.

The Apportionment Clause, Art.I., § 2, cl.3,[3]

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[3] The apportionment clause of the original constitution reads as follows:

> Representatives ... shall be apportioned among the several States ... according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons ... and excluding Indians not taxes, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years,

requires that the Census Bureau make a tabulation of the population of each state and of each city and sub-unit within a state that as accurately as possible includes all person reasonably capable of being determined to reside within each state and within each city and sub-unit within a state. This constitutional obligation is breached if the census is conducted in a particular locale, such as the City of Detroit, in such a manner that substantial numbers of persons are in fact missed, so that the official population count for that place as reported by the Bureau is substantially less than its actual population and results in a serious undercount of minorities. A breach also occurs if the Secretary of Commerce fails to use proven statistical techniques to adjust the official population count among the states and of the cities and sub-units within the state for the admittedly racial differential undercount, which the Census Bureau declared would increase the accuracy of the census and correct the disproportionate undercount of minorities. City of New York v. United States Department of Commerce, 34 F.3d 1114, 1122-23 (2nd Cir. 1994). Where an official population count as adjusted would more accurately report the actual population of a state and of the cities and sub-units within the state than an official population count based on the raw unadjusted census data alone, which predictably results in a differential undercount of members of minority groups, the constitution has been violated. The Secretary of Commerce acknowledged a differential undercount would occur in the unadjusted census. The Secretary conceded that the PES

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in such Manner as they shall by Law direct.

The fourteenth amendment later changed the first sentence of the apportionment clause to read as follows:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

was of high quality and detected an overall undercount in the census and a differential undercount in the national level by race and ethnic origin. Id. An adjustment would have dramatically increased the accuracy of the census.

The constitutional basis for the decennial census relates entirely to the apportionment of representation in the United States House of Representatives among and within the several states and to the representation of persons within that body in accordance with the principle of equal representation for equal numbers of people. Art.I, § 2, cl.3, as amended by amend. XIV, § 2, provides first, that Representatives shall be apportioned among the several states "according to their respective numbers, counting the whole number of persons in each State," and goes on to provide for the taking of the decennial census in order that the "whole number of persons in each State" may be officially tabulated and certified by the United States government.

In regards to the constitutional objective of "equal representation for equal numbers of people" in the United States House of Representatives, the differential undercounting of minorities is a serious problem, because it is not randomly distributed. The racially differential undercount for blacks in the 1990 Census was about three times that for non-blacks. This means that cities like the City of Detroit, with its 75.6% black population, are disproportionately undercounted in relation to virtually all other states and all of Michigan's other cities having substantially lower black populations than the City of Detroit. Thus, the State of Michigan, on the national level, and the City of Detroit residents received proportionately less congressional representation in the United States House of Representatives than was received by other cities in other states and other cities in the State of Michigan.

Accordingly, within the State of Michigan and among other states, there has in fact been a violation of the constitutional principle of equal representation.

A loss of representation due to census inaccuracy raises a concern of constitutional dimension. In Carey v. Klutznick, 637 F.2d 834 (2d Cir. 1980), the City of New York and New York State challenged the manner in which the Census Bureau conducted the 1980 census. The plaintiffs in that case based their claim on the Apportionment Clause and alleged that the census was conducted in such a manner that would inevitably result in an undercount, which would not be evenly distributed across the state, but would instead occur at a higher rate in low-income areas populated largely by members of minority groups. Similar to the arguments raised by the City of Detroit in City of Detroit v. Franklin, 800 F.Supp. 539 (E.D. Mich. 1992), the gravamen of their claim rested on the inaccuracy of the Address Control File prepared for New York City. Id. at 836.

The defendants in Carey v. Klutznick argued that the allegations as to the mismanagement of the census alleged in the complaint failed to state a justiciable claim under the Apportionment Clause. The Second Circuit emphatically rejected this contention. It noted that if the procedures used to conduct the census resulted in a disproportionate undercount in New York City, this could deprive the state and the city of the congressional representation to which they were entitled under the Constitution. Since this result would be inconsistent with the constitutional requirement of "equal representation for equal numbers of people" in the United States House of Representatives, Wesberry v. Sanders, 376 U.S. 1, 7-8, 84 S.Ct. 526; 11 L.Ed 2d 481 (1964), the Second Circuit Court of Appeals concluded that the plaintiffs had stated a justiciable claim under the Apportionment

Clause. Carey v. Klutznick, supra at 839. Stated simply, the Second Circuit held that the claim was justiciable, because the Apportionment Clause requires that Congress be fairly apportioned on the basis of accurate census figures. Id. As a result of the Second Circuit's decision in Carey v. Klutznick, the challenge of New York City and New York State to the accuracy of the official count of their populations in the 1980 decennial census was determined on the merits. Cuomo v. Baldridge, 674 F.Supp. 1089 (S.D.N.Y. 1987).

The Secretary's decision not to adjust the enumeration results in an undercount, and a loss of political representation arises under Article I, § 2."[4] The loss of representation violates the Constitution's goal of equal representation for equal numbers of people. As the Court observed in Carey v. Klutznick, 637 F.2d 834, 839 (2d Cir. 1980):

> [T]he Supreme Court has held that Article I, § 2 of the Constitution means that "as nearly as is practicable one man's vote in a

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[4] In an adjustment for the racially differential undercount had been made in accordance with the figures derived from the Post-Enumeration Survey, the City of Detroit would embrace 1.811 Congressional districts instead of 1.769, thereby increasing the plaintiff Young's weight of representation and weight of vote in the United States House of Representatives. This weight of representation and weight of vote would be increased still further if the population of the City of Detroit were increased to include the persons missed in the taking of the decennial census, as per the plaintiffs' undercount claim. The federal court would be constitutionally required to reopen the case and order a new apportionment because the census data on which the original apportionment was made was no longer valid, and so could not constitutionally be used as the basis for an apportionment of Congressional representation.

> congressional election is to be worth as much as another's," Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964), and that "our Constitution's plain objective [is to make] equal representation for equal numbers of people the fundamental goal," Id. at 18. See also Wells v. Rockefeller, 394 U.S. 542 (1969); Kirkpatrick v. Preisler, 394 U.S. 526 (1969).

Based on those principles, the Carey court recognized that a claim that census inaccuracy would result in a loss of congressional representation arises under Article I, § 2, cl.3, of the Constitution and that constitutional challenges to apportionment are fully justiciable. Franklin v. Massachusetts, 505 U.S. 788, 112 S.Ct. 2767, 2777, 120 L.Ed 2d 636 (1992); United States Department of Commerce v. Montana, 503 U.S. 788, 112 S.Ct. 1415, 1426-27, 118 L.Ed.2d 87 (1992). Thus, the apportionment clause does not represent a textually demonstrable constitutional commitment to the political branches (Congress or the President) of constitutional questions relating to the decennial census or the use of census data for the apportionment of congressional representation. United States Department of Commerce v. Montana. Accordingly, the apportionment clause can be the source of judicially cognizable obligations imposed on the Census Bureau with respect to the conduct of the census, and the determination of the official population count among the states and of the cities and sub-units within a state.

In the very recent case of United States Department of Commerce v. Montana, supra, 112 S.Ct. 1415 (1992), the State of Montana challenged the constitutionality under the Apportionment Clause of Congress' use of the "equal proportions" method to allocate seats in the United States

House of Representatives between the states, contending that Congress was constitutionally required to use the "method of harmonic mean" instead. The Government argued that "Congress' selection of any of the alternative apportionment methods involved in this litigation is not subject to judicial review," and that, "the choice among these methods presents a 'political question' not amenable to judicial resolution." Id. at 112, S.Ct. at 1424.

In rejecting this contention, the Supreme Court emphasized that the Government was confusing the justiciability of the issue of whether the Constitution required Congress to select a particular method of apportionment with the substantive constitutional question of whether the method chosen by Congress violated the Constitution. Id., 112 S.Ct. at 1425. That substantive constitutional question was fully justiciable by the courts, since as the Court stated: "The controversy between Montana and the government turns on the proper interpretation of the relevant constitutional provisions. As our previous rejection of the political question doctrine in this context should make clear, the interpretation of the apportionment provisions of the Constitution is well within the competence of the Judiciary." Id., 112 S.Ct. at 1425-6 (emphasis added).

The principle of equal representation for equal numbers of people in the United States House of Representatives applies not only to the apportionment of representation among the several states, but also to the apportionment of Congressional representation within each state, and drawing lines for the allocation of congressional and legislative seats within states. In Wesberry v. Sanders, 376 U.S. 1, 8, 84 S.Ct. 526, 530, 11 L.Ed.2d 481 (1964), the Supreme Court held that Art. I, § 2, cl.3, requires "as nearly as is practicable, one man's vote in a congressional

election to be worth as much as another's." Furthermore, the apportionment clause controls the apportionment of Congressional representation within each state, as well as among the several states, and requires that Congressional apportionment within each state take place strictly in accordance with the principle of equal representation for equal numbers of people. Subsequent decisions of the Court have made it clear that the apportionment of Congressional representation within a state must follow the principle of equality. A state must make a good-faith effort to achieve precise mathematical equality, and the state has the burden of justifying each variance from that standard, no matter how small. Karcher v. Daggett, 462 U.S. 725, 730-31, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983); Kirkpatrick v. Preisler, 394 U.S. 526, 530-31, 89 S.Ct. 1225, 22 L.Ed. 2d 519 (1969).

The holding in Wesberry and the cases following also make it clear that the constitutional function of the decennial census, to ensuring that the House of Representatives should represent "persons according to their respective numbers," includes the determination of the population of the cities and sub-units within each state, so that Congressional districts within each state can be drawn in accordance with the principle of "equal representation for equal numbers of people." And as the Court noted in Kirkpatrick, supra at 531: "Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives."

The constitutional obligation of the Census Bureau to conduct the most accurate census that it is reasonably possible to conduct, relates to and is derived from the constitutional function of the decennial census: "to enumerate the whole number of persons in each State" for the purpose

of apportionment of representation in the House of Representatives." First, Art. I, § 2, cl.3, requires that the apportionment of Congressional representation among the several states and within each state take place strictly in accordance with the principle of equal representation for equal numbers of people. Second, the official population count of the several states and of the cities and sub-units within each state, as tabulated and certified by the Census Bureau, is the constitutional basis for the apportionment of Congressional representation among the several states, and is in fact the only constitutionally permissible basis for the apportionment of Congressional representation within each state. This being so, the official population count of all of the several states and of each city and sub-unit within a state must be as accurate as is reasonably possible and must not disproportionately fail to include minority persons living in a particular state or states in relation to persons living in other states or minority persons living in a particular city or sub-unit within a state in relation to persons living in other cities or sub-units in the state.

A disproportionate undercount of the residents of a particular state or the residents of a particular city or sub-unit within a state will lead to a constitutional distortion. If the official population count of a state or of a city or sub-unit within a state, as reported and certified by the Census Bureau, does not as accurately as is reasonably possible report the number of persons residing in that state in relation to the actual number of persons residing in other states, or the actual number of persons residing in a city or sub-unit within a state in relation to the actual number of persons residing in other cities and sub-units within the state, when the official population count is used in Congressional reapportionment following the decennial census, the reapportionment will not in fact take place in accordance

with the principle of "equal representation for equal numbers of people." Residents of the disproportionately undercounted states or the cities and sub-units within a state will in actuality have less representation in the House of Representatives than the residents of the other states and the residents of the cities and sub-units within a state for whom the official population count more accurately reports their actual population. The purpose of redistricting is to ensure residents enjoy equal representation in their legislatures. Kirkpatrick v. Preisler, supra, 394 U.S. at 530. The constitutional function of the decennial census, therefore, will have been subverted, because as among the several states, and within each state, there will not in fact be "equal representation for equal numbers of people" in the United States House of Representatives.

The Supreme Court in Wesberry v. Sanders, supra, 376 U.S. at 18, held that "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." Reynolds v. Sims, 377 U.S. 533, 562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

As the Supreme Court in Reynolds has explained:

> [T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State.

Reynolds v. Sims, 377 U.S. at 560-61. In accordance with these principles, this Court has recognized that a dilution of the votes of state residents, "particularly members of minority groups - vis-a-vis those of other residents of the state with respect to the state legislature", that results from census inaccuracy, impairs rights secured by the Constitution. Carey v. Klutznick, 637 F.2d at 836.

As a result, of both the undercount within the City of Detroit and the failure of the Secretary of Commerce to adjust for the racially differential undercount, there has been an extreme disproportionate undercount of minorities of the City of Detroit in relation to most of the other cities and sub-units within the State of Michigan. It follows, therefore, that when the Congressional redistricting of Michigan was carried out in accordance with the official population count of the cities and sub-units of the State of Michigan, as reported and certified by the Census Bureau, the resulting Congressional apportionment did not in fact satisfy the constitutional requirement of equal representation for equal numbers of people in the United States House of Representatives. Residents of the City of Detroit do not in fact have equal representation for equal numbers of people in the United States House of Representatives, and residents of most of Michigan's other cities and sub-units have greater representation in the House than that to which they are constitutionally entitled.

Furthermore, the concentration of the undercount among minority populations in the 1990 census means that when the unadjusted census is used for redistricting, the goal of producing districts containing the same number of residents cannot be met. Districts with more minority residents than the average for other districts with which they are being compared for redistricting purposes will therefore

have larger populations than the average district, diluting the votes of residents of the high -minority districts such as the City of Detroit. The effect of the undercount left uncorrected was to create a deviation from an accurate census, far more than is constitutionally tolerable. See Karcher v. Daggett, supra, 462 U.S. at 731-34. Minorities and those who live in communities where they are concentrated bear the burden of that deviation from equality of population in the dilution of their votes.

The principle of equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality or for which justification is shown. Kirkpatrick v. Preisler, supra, 22 L.Ed.2d 519, 524. Clearly, the racial differential undercount among minorities was not unavoidable. The Court of Appeals found to the contrary, as the Secretary of Commerce conceded that "PES adjusted estimates reflect more accurately the total population and the ethnic population of the country." City of New York v. U.S. Department of Commerce, supra, 34 F.3d at 1122-1123.

The record clearly established in the instant case that no legally acceptable justification for tolerating the differential undercount existed, City of New York v. U.S. Department of Commerce, supra, 34 F.3d at 1130-1131. The differential undercounting of minorities is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people. In Reynolds v. Sims, the Supreme Court enunciated that:

> "Neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities

> from population based representation. Citizens, not history or economic interests, cast votes." Reynolds v. Sims, supra, 377 U.S. at 579-580, 12 L.Ed.2d at 537-538.

Thus, the Secretary of Commerce's concern with upholding "a two-hundred year tradition of how we actually count people", City of New York v. U.S. Dept of Commerce, supra at 1122, cannot withstand constitutional muster.

Art. I, § 2, cl. 3 of the United States Constitution requires that the official decennial population count reflect as accurately as is reasonably possible, the true population of the state, cities, and other governmental sub-units within each state. The official population count using only raw unadjusted census data, does not accurately reflect the actual population of the states, and governmental units within the states. Raw unadjusted census data dilutes the weight of a citizen's vote and strikes at the heart of representative government. See Reynolds v. Sims, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1964). The failure to adjust the data of the decennial census for a known undercount of minorities violates Art. I, § 2, cl. 3, which guarantees that all people will have their vote counted equally with other persons. The debates at the Convention indicated that the founders of the Constitution wanted to ensure fair representation. Nothing in Art. I, § 2, cl. 3 prohibits an accurate statistical adjustment of the decennial census to obtain an accurate count. Quite to the contrary, Article I of the Constitution, which mandates equal apportionment of representatives, also mandates an adjustment to obtain a more accurate census of the actual population. When the allocation of federal resources and the apportionment of congressional representatives rest on an accurate census, it is unconstitutional for the Secretary of

Commerce to refuse to adjust the census data, when he knew that an undercount which heavily disfavored blacks and other minorities occurred, and there is a proven statistical method in existence to correct the undercount.

Because of the nature of the right, the Court of Appeals correctly applied heightened judicial scrutiny of the Secretary's decision. The Secretary's decision placed other incidental factors above lessening the disproportionate undercounting of minorities. City of New York v. Department of Commerce, supra, 34 F.3d. at 1130-1131. The critical paragraph in the Court of Appeals' decision, in which the court explained the basis for its conclusion that the Secretary's judgment was not made in good faith, is as follows:

> In the present case, the findings of the district court . . . plainly show that plaintiffs carried their burden of proving that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable. Those findings are supported by, inter alia, the Secretary's acknowledgement that the PES-indicated adjustments would likely not only make the census more accurate nationally, but would also reduce the disparate impact of the census' inaccuracies on minority groups, and that he gave other factors priority over achievement of greater accuracy. For example, he stated that he valued "distributive accuracy" over numerical accuracy; and in stating that an adjustment would not be made because it would not result in greater distributive accuracy, the Secretary revealed

> that he would decline to make the generally improving adjustment that would lessen the disproportionate undercounting of minorities if it would result in a distribution of Representatives that would be different from the present distribution, although just as accurate. Id.

The Secretary conceded that the "PES-adjusted estimates reflect more accurately the total population and the racial and ethnic populations of the country." City of New York v. Department of Commerce, supra, 34 F.3d at 1122, 1130. With that concession, the Secretary also conceded that an adjustment would improve the distributive accuracy of the census. Id. "The impact of the differential undercount was naturally more severe in those areas in which racial and ethnic minorities were more concentrated." Id. at 1131.

The Court of Appeals properly disapproved the district court's extreme deference. Following this Court's teachings and analysis therein in the line of case law authority that runs from Wesberry v. Sanders, 376 U.S. 1 (1964), through Karcher v. Daggett, 462 U.S. 725 (1983), the Court of Appeals observed that the requirement of a "good-faith effort" to achieve voter equality, where allocation of political representation is at issue, is imposed on federal, as well as state, actors. Montana, supra, 503 U.S. at 460-464; City of New York v. Department of Commerce, supra, 34 F.3d at 1129, 1131. The Court of Appeals recognized that constitutional constraints on the apportionment of the House of Representatives mean that "the goal of precise equality in voting power is 'illusory for the Nation as a whole,'" (quoting Montana, 503 U.S. at 463), but concluded that "[t]he impossibility of achieving precise mathematical equality is no excuse for not making

this mandated good-faith effort." City of New York v. Department of Commerce, supra, 34 F.3d at 1129.

A long line of cases rooted in the Constitution and its history has established that the right to vote is one crucial to the presentation of our democratic society and that such right cannot be abrogated. In Reynolds v. Sims, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1963), the Supreme Court stated:

> "The right to vote freely for the candidate of one's choice is the essence of a democratically society and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Because the right to vote involves a fundamental right, coupled with the fact that the severe undercounting of minority and ethnic groups diluted the minority vote, the court correctly held that a heightened degree of scrutiny should occur. City of New York, supra, at 1128. The right to have one vote's count equally is fundamental and constitutionally protected. The Equal Protection Clause guarantees the opportunity for equal participation by all voters. Dilution of the weight of a vote because of race or place of residence impairs basic constitutional rights. Reynolds v. Sims, supra, 377 U.S. at 566, 84 S.Ct. 1384, 12 L.Ed.2d 529-530.

Applying the analytic framework of Karcher, supra, 462 U.S. at 730-731, the Court of Appeals accepted the

district court's finding that the adjusted counts had been shown to be more accurate, and proceeded to the question of whether Plaintiffs had carried their burden of showing the decision to use less accurate data "was not the product of a good-faith effort to achieve equality." In considerable detail, the Court of Appeals spelled out the basis for its determination that Plaintiffs had carried that burden. City of New York v. U.S. Department of Commerce, supra, 34 F.3d at 1130-1131. The Court of Appeals correctly held that in cases involving apportionment, a plaintiff is required to show only "that the governmental entity failed to make a good-faith effort to achieve equal districts as nearly as practicable." Plaintiff need not show that the government's discrimination was not intentional. Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed 2d 597 (1976).

The Supreme Court in Karcher v. Daggett, supra, 462 U.S. 725 (1983), made it clear in that case that the official population count of the cities and sub-units of the state, as reported and certified by the Census Bureau, was the only reliable indicator of the actual population of the cities and sub-units of the state, and so could be the only basis for Congressional apportionment within the state. As the Supreme Court stated: "[b]ecause the census count represents the 'best population data available,' it is the only basis for good-faith efforts to achieve population equality." 462 U.S. at 738. As the Court also noted, "Adopting any standard other than population equality, using the best census data available, would subtly erode the Constitution's ideal of equal representation." Id. at 731.

The right to protection from an individual vote being diluted, flows from "the fundamental principle in this country that the democratic system mandates equal representation for equal numbers of people without regard to

race, sex, economic status or place of residence within a state and among the states." Reynolds v. Sims, 377 U.S. 533, 560-61, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); Wesberry v. Sanders, 376 U.S. 1, 17-18, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964). The whole thrust of the "as nearly as practicable" approach is inconsistent with the adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. Since equal representation for equal numbers of people is the fundamental goal for the House of Representatives", Wesberry v. Sanders, supra, 376 U.S. at 18, 84 S.Ct. at 535, the "as nearly as practicable" standard requires the federal government and the state to make a good faith effort to achieve equality. See Karcher v. Daggett; Reynolds v. Sims, 377 U.S. 533, 577, 84 S.Ct. 1362, 1389, 12 L.Ed.2d 506 (1964).

Accordingly, unless a legitimate governmental objective exists for the racially differential undercount, this Court cannot tolerate or uphold the Secretary's decision to refuse to adjust the census data. The differential undercounting of minorities may be expected to continue in future censuses, and so will again result in the subversion of the constitutional objective of "equal representation for equal numbers of people" in the United States House of Representatives if the matter is not resolved, and the Secretary of Commerce is not required to prove a legitimate governmental objective exists for refusal to adjust the census.

CONCLUSION

For the reasons stated herein, the Court of Appeals' opinion should be affirmed and the case remanded to the district court for the Secretary of Commerce to explain what

legitimate governmental objective exists to support his reliance upon the unadjusted census data and his refusal to adjust the census.

Respectfully submitted,

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